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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OCT - 7 1996

Federal Communications Commission
Office of Secretary

In The Matter of

INTERCONNECTION AND RESALE
OBLIGATIONS PERTAINING TO
COMMERCIAL MOBILE RADIO
SERVICES

CC Docket No. 94-54

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REPLY COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g), hereby replies to comments submitted by other parties¹ in response to petitions seeking reconsideration² of certain aspects of the Commission's First Report and Order, FCC No. 96-263 (released July 12, 1996) in the captioned proceeding (the "First Report and Order").³

¹ Comments were submitted by the Cellular Telecommunications Industry Association ("CTIA"), the National Wireless Resellers Association ("NWRA"), the Rural Cellular Association ("RCA"), AT&T Corp. ("AT&T"), MCI Telecommunications Corporation ("MCI"), Cable & Wireless, Inc. ("CWI"), Bell Atlantic NYNEX Mobile, Inc. ("BANM"), Paging Network, Inc. ("PageNet"), ARDIS Company ("ARDIS"), and RAM Mobile Data USA Limited Partnership ("RAM").

² Petitions for reconsideration have been filed by NWRA, CTIA, AT&T, American Mobile Telecommunications Association, Inc. ("AMTA"), Connecticut Telephone and Communications Systems, Inc. ("CTCS"), Nextel Communications, Inc. ("Nextel"), Personal Communications Industry Association ("PCIA"), and Small Business in Telecommunications ("SBT").

³ Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, FCC 96-263 (released July 12, 1996).

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I.

INTRODUCTION

In its Comments, TRA commended the Commission for its well-reasoned, analytically sound decision to extend its long-standing cellular resale requirements to other commercial mobile radio services ("CMRS"), including broadband personal communications services ("PCS") and certain specialized mobile radio service providers ("Covered SMR"). Accordingly, TRA adamantly opposed suggestions by PCIA and Nextel that the Commission reconsider this action. TRA also endorsed the Commission's view that the CMRS resale requirement encompassed bundled offerings of CMRS and non-Title II products and services, such as customer premises equipment ("CPE") and enhanced services, and thus strongly opposed efforts by AT&T and PCIA to eliminate this requirement. The only matter as to which TRA supported reconsideration was the request of the NWRA and CTCS that the Commission revisit its decision to terminate the CMRS resale requirement five years following the award of the last group of initial licenses for currently allocated broadband PCS spectrum. As to this "sunset" requirement, TRA urged the Commission to leave to the market the issue of when resale has ceased to provide a public interest benefit, arguing that as the market approached perfect competition, the viability of resale would wane. Accordingly, TRA argued, there is no need to establish a "sunset" date for an activity which the Commission has repeatedly found is of strategic importance to the development and maintenance of competition and produces numerous other benefits for consumers.

In these Reply Comments, TRA will address the oppositions of RCA, AT&T and BANM to NWRA's and CTCS's petitions urging the Commission to reconsider its CMRS resale

"sunset" requirement and the comments of AT&T and CTIA in support of PCIA's and AT&T's petitions for reconsideration of the Commission's finding that "excluding from the resale rule all bundled packages that include non-Title II components would potentially offer carriers an easy means to circumvent the [resale] rule."⁴

II

ARGUMENT

A. The Commission Should Lift Its CMRS Resale 'Sunset' Requirement

In assessing the advisability of the "sunset" requirement imposed by the First Report and Order on CMRS resale requirements, a number of factors must be considered. Among these factors are the current level of competition in the wireless industry, the likely competitive conditions in the wireless industry at the beginning of the twenty-first century, and the relative costs and benefits of resale of CMRS. The Commission has already provided clear answers to the first and third issues. The second question is simply not subject to definitive resolution. As TRA suggested in its Comments, the answers provided by the Commission to the first and third issues require retention of an expansive CMRS resale requirement. The inability to resolve the second issue argues strongly for a "wait-and-see" approach as opposed to a definitive "sunset" date.

It is well documented that the cellular market is not particularly competitive; indeed, seemingly every governmental agency which has evaluated the cellular market has arrived at the same conclusion:

⁴ Id. at ¶ 31.

U.S. Department of Justice ("DOJ"):

The Department's extensive investigations into the cellular industry . . . indicate that cellular duopolists have substantial market power . . . The basic structural problem with cellular markets is well known -- the fact that they are and have been duopolies with (at least until very recently) absolute barriers to entry. While the FCC's decision to issue two cellular licenses -- rather than only one -- was motivated by a desire to stimulate competition, . . . two firm markets are not particularly competitive. The noncompetitiveness of two-firm markets is exacerbated here by the overlapping alliances of the cellular carriers, so that firms that "compete" with each other in one market are partners in another.⁵

U.S. Government Accounting Office ("GAO"):

[T]he two-carrier (duopoly) market system that the FCC created may provide only limited competition in cellular telephone markets.⁶

Federal Communications Commission:

We find unpersuasive arguments that number portability is unimportant because the CMRS market is already substantially competitive since CMRS customers already may choose from multiple competitive carriers. Most CMRS customers today subscribe to cellular service because broadband PCS has been offered for a very short time, SMR service has typically been used for communications among mobile units of the same business subscriber (e.g., taxi dispatch), and mobile satellite services have typically been used only in rural areas. . . We note that while the cellular industry, with two facilities-based carriers offering service in each market, is more competitive than traditional monopoly telephone markets, it is far from perfectly competitive.⁷

⁵ Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 10 FCC Rcd. 8844, ¶ 65 (1995) (citing Memorandum of the United States in Response to the Bell Companies' Motions for Generic Wireless Waivers at 14-15, United States v. Western Electric Co., Civ. Action No. 82-0192 (HHG), D.D.C., filed July 25, 1994).

⁶ Id. at ¶ 65 (1995) (citing July 1992 Gen. Acct'g Off. Rep., Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry, GAO/RCED-92-220 at 2).

⁷ Telephone Number Portability, CC Docket No. 95-116, First Report and Order, FCC Rcd. 11 at 8352, 8435 (1996), *pet. for recon. pending* (internal citations omitted).

The public interest benefits of resale generally and of resale in the wireless environment are also well documented. The Commission has long recognized that the resale of telecommunications services generates "numerous public benefits," among which are the downward pressure resale exerts on rates and the enhancements resale produces in the diversity and quality of product and service offerings.⁸ Indeed, in the First Report and Order, the Commission enumerated many of the "important public benefits" resale confers:

First, the economic literature on resale price maintenance illustrates that prohibiting resale restrictions may reduce the likelihood of systematic price discrimination and cartel behavior. Second, in the wireline context the resale rule has been found to promote the public interest by: (1) encouraging competitive pricing; (2) discouraging unjust, unreasonable, and unreasonably discriminatory carrier practices; (3) reducing the need for detailed regulatory intervention and the administrative expenditures and potential for market distortions that may accompany such intervention; (4) promoting innovation and the efficient deployment and use of telecommunications facilities; (5) improving carrier management and marketing; (6) generating increased research and development; and (7) positively affecting the growth of the market for telecommunications services. Third, we have recognized the public interest benefits of resale in the wireless context, and have facilitated them by explicitly conditioning cellular licenses on adherence to our resale policy. In particular, we have recognized that resale of wireless services can speed the deployment of competition by permitting new entrants to begin offering to the public before they have built out their facilities.⁹

Moreover, the Commission stressed in the First Report and Order the importance of resale "in markets that have not achieved full competition," noting that "an active resale market helps to

⁸ AT&T Communications: Apparent Liability for Forfeiture and Order to Show Cause, 10 FCC Rcd. 1664, ¶ 12 (1995), *remanded sub nom. AT&T Corp. v. FCC*, Case No. 95-1339 (filed July 5, 1995).

⁹ Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, FCC 96-263 at ¶ 10.

replicate many of the features of competition . . . [and] hastens the arrival of competition by speeding the development of new competitors."¹⁰

Echoing this theme, the Commission recently acknowledged that resale would be "an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled elements or by building their own networks."¹¹ "In light of the strategic importance of resale to the development of competition", the Commission concluded that it was "especially important to promulgate rules for use by state commissions in setting wholesale rates" and to "reduce unnecessary burdens on resellers seeking to enter local exchange markets" by presuming resale restrictions and conditions to be unreasonable.¹² In so concluding, the Commission was reflecting the sense of Congress that resale was a critically important pro-competitive tool. This Congressional view is made clear in the mandate of Section 251(c)(4) of the Telecommunications Act of 1996 (the "1996 Act") that incumbent local exchange carriers not only make all of their retail services available for resale, but that they do so at wholesale rates.¹³

To paraphrase the Commission findings elsewhere, there exists an "inequality of bargaining power" between cellular licensees and cellular resale carriers; negotiations between cellular licensees and resale carriers "are not analogous to traditional commercial negotiations in

¹⁰ *Id.* at ¶ 11.

¹¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶ 907 (released August 8, 1996), *pet. for rev. pending sub nom. Iowa Utilities Board v. FCC*, Case No. 96-3321 (8th Cir. Sept. 5, 1996) ("Local Competition Order").

¹² *Id.* at ¶¶ 907, 939.

¹³ Pub. L. No. 104-104, 110 Stat. 56, § 251(C)(4) (1996).

which each party owns or controls something the other party desires."¹⁴ Rather, cellular licensees are required to "make available their facilities and services to requesting carriers that intend to compete directly . . . for [their] customers and [their] control of the [cellular] market."¹⁵ Given the "strong incentives" cellular licensees, like any other entity with market power, will have to resist market intrusion, "rules that have the effect of equalizing bargaining power" are necessary to facilitate cellular resale.¹⁶

It is thus apparent that wireless resale requirements continue to enhance competition and generate innumerable benefits for CMRS users. Moreover, these benefits are secured at little or no cost. As the Commission long ago surmised, "resellers, like other users, are valued customers -- in fact, they are large customers."¹⁷ While the Commission was wrong in its assessment that resale carriers are "valued customers," it was correct in its view that resale carriers are large customers. Any facilities-based carrier that complains of the costs associated with Commission imposed resale requirements is categorizing as "costs" either (i) the customers it has lost to its resale carrier customers/competitors or (ii) the expenses associated with its attempted avoidance of resale requirements. In other words, the complaining facilities-based provider is implicitly acknowledging that it has the market position to refuse service to certain large customers and hence must be disciplined with a resale obligation.

¹⁴ Local Competition Order, FCC 96-325 at ¶ 55.

¹⁵ Id.

¹⁶ Id.

¹⁷ Competition in the Interstate, Interexchange Marketplace, 6 FCC Rcd. 5880, ¶ 115 (1991) ("First Interexchange Competition Order"), 6 FCC Rcd. 7255 (1991), 6 FCC Rcd. 7569 (1991), 7 FCC Rcd. 2677 (1992), *recon.* 8 FCC Rcd. 2659 (1993), 8 FCC Rcd. 3668 (1993), 8 FCC Rcd. 5046 (1993), *recon.* 10 FCC Rcd 4562 (1995)

The sole remaining question then is whether a CMRS resale requirement will be necessary at the turn of the twenty-first century. Obviously, no one knows and any assessment of the competitive condition of the wireless market seven years hence must by necessity be entirely speculative. TRA submits that the logical approach in such a circumstance would be a "wait-and-see" stratagem. Why assume that competition may negate the need for a CMRS resale requirement and risk not only market disruption, but denial of recognized public interest benefits, when such an approach is not necessary? Why not schedule a notice of inquiry every five years or so to assess the competitive state of the wireless market and act on the basis of a factual, rather than a theoretical, record. As TRA explained in its Comments, the market will provide all the necessary signals. If a market closely approaches "perfect competition," opportunities for resale will simply dry up and no resale obligations will be necessary. At that point, not before, a "sunset" provision would be warranted.

Such a reasoned approach is particularly important now given the directive of Congress to "identif[y] and eliminat[e] . . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services."¹⁸ As TRA explained in its comments in GN Docket No. 96-113, resale is one of the primary market entry vehicles for small businesses and the resale industry is one of a precious few small business success stories in the telecommunications environment.¹⁹ Given the Commission's recognition that "small businesses currently constitute only a small portion of

¹⁸ 47 U.S.C. § 257.

¹⁹ Comments of TRA filed in GN Docket No. 96-113 on September 27, 1996.

telecommunications companies,"²⁰ it makes little sense to prematurely schedule for elimination a key small business market entry vehicle.

B. The Commission Should Continue To Apply The CMRS Resale Requirement To Bundled Service Packages Containing Non-Title II Offerings

As noted above, in making the CMRS resale requirement applicable to bundled service packages containing non-Title II offerings, the Commission recognized that "excluding from the resale rule all bundled packages that include non-Title II components would potentially offer carriers an easy means to circumvent the rule."²¹ This assessment is not only rational and logical, but unavoidable. Obviously, allowing CMRS licensees to bundle CPE or enhanced services with CMRS, but requiring that they make only the CMRS component available for resale would effectively negate the resale requirement. Arguments to the contrary are frivolous.

As TRA explained in its Comments, absent a resale obligation encompassing the totality of bundled services offerings, a CMRS licensee combining CMRS with CPE or enhanced services possesses the unfettered ability to structure a package for the benefit of a retail customer which effectively lowers the rate of the service element to the customer without triggering the licensee's obligation to offer an equivalent "effective" service rate to resale carriers. Worse yet, the CMRS licensee can do so in a fashion that will destroy the ability of resale providers to compete. The CMRS licensee accomplishes this feat by maintaining an official price for the CMRS component but bundling into the arrangement CPE or enhanced services at a sufficiently

²⁰ Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), GN Docket No. 96-113, ¶ 6 (1996).

²¹ Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, FCC 96-263 at ¶ 31.

reduced rate (or at no charge) so as to adjust the price of the service element downward to a level below the cost at which the resale carrier obtains service from the CMRS provider.

It matters little whether CPE or enhanced services markets are competitive -- of course they are. But this is not the issue here. The issue is the use by duopoly providers of bundled offerings of regulated and non-regulated products and services to avoid regulatory requirements and to defeat competition through anticompetitive abuse of market power. Only a CMRS licensee will be in a position to essentially give CPE or enhanced services away because licensees, unlike resale carriers, do not have to pay others for the provision of CMRS.

Finally a resale requirement on bundled offerings of regulated and non-regulated products and services would not deter creative packaging of services; indeed, it would encourage true creativity. The true creativity would be generated by competitive pressures and would provide real savings to consumers. The creative packaging to which AT&T and PCIA refer represents false savings which will evaporate once competitive alternatives are no longer available.

TRA commends the Commission for avoiding a loophole which could easily envelop the rule and urges the Commission to stand firm in its refusal to provide such a transparent vehicle for discrimination against resale carriers.


III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to reinforce its commitment to wireless resale by rescinding the CMRS resale requirement "sunset" provision and by preserving the application of the CMRS resale requirement to bundled service packages containing non-Title II offerings.

Respectfully submitted,

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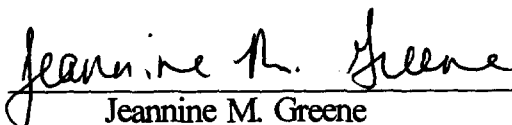
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